Tan Joo Chai & Anor v Eco Water Technologies (M) Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–881–04 OF 2012

ABDUL MALIK ISHAK, ABDUL WAHAB PATAIL AND AZIAH ALI JJCA

6 JANUARY 2015

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Contract — Damages — Claim for — Allegation of breach of fiduciary duties by directors of company in relation to projects — Appellant ordered to pay RM2m to respondent — Appeal against decision of High Court — Directors entered into joint venture projects — Company suffered losses — Whether losses caused by acts or omissions of directors

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The appellants appealed against the decision of the High Court in favour of the respondent in respect of alleged breaches of the appellants' fiduciary duties as directors of the respondent company in relation to three projects undertaken by the respondent. The High Court had ordered the appellants to pay the respondent the sum of RM2m with interest at 4%pa from the date of the writ until the date of payment with costs to be taxed. The appellants were directors of the respondent which was involved in joint ventures in three projects. The claim by the respondent company was founded upon the appellants' alleged breach of fiduciary duty in respect of the joint venture projects with Tangkas Hadapan and Amirol Bakti. The High Court found that in respect of: the joint venture project with Amirol Bakti, the respondent had failed to prove, upon a balance of probabilities, the alleged losses and that they were caused by the acts, omissions or breach of fiduciary duties of the appellants; and the joint venture project with Tangkas Hadapan, the respondent had, upon a balance of probabilities proved breach of fiduciary duties by the appellants by approving and irresponsibly releasing the payment of RM2m without authority of the board of directors and before entering into a binding and enforceable agreement with Tangkas Hadapan. There was no appeal by the respondent against the dismissal of its claim in respect of the joint venture with Amirol Bakti. The appellants appealed against the order to pay damages in the sum of RM2m with interest at 4% from the date of the filing of the writ until full settlement, with costs in respect of the respondent company's joint venture with Tangkas Hadapan.

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Held, allowing the appeal with costs:

(1) The fact of making payment of RM2m without a director's resolution authorising the same became immaterial when the shareholder's resolution authorised the execution of the JVA. There was no evidence

that Tangkas Hadapan denied receiving the money. The fact that the JVA came into being and the respondent company commenced work and progress claims were submitted, made it self-evident that the payment played a role to lead to the JVA and the respondent company obtaining work (see para 11).

(2) The problem was not a dispute as to whether RM2m was paid according to the JVA, but arose when the progress payments from the JKR, put into the project account was diverted by the main contractors contrary to their subcontract agreement with Tangkas Hadapan. In the fall out from Tangkas Hadapan ceasing to proceed with the main contractors, the JVA between the respondent company and Tangkas Hadapan came to nought. There was no evidence and it was not the respondent company's case that even if the JKR progress payments were not diverted by the main contractors, the joint venture with Tangkas Hadapan would have failed. In the circumstances, the High Court clearly misappreciated the evidence before it and came to a finding it could otherwise not have made (see para 11).

(3) Directors may take risks with the company's property where they honestly believe that to do so is in the company's interest. This is indeed the essence of entrepreneurship. Just because a director makes a wrong decision does not mean that he breached his fiduciary duty to the company. Doing business is not for the naive. It is trite that doing business always involves an element of risk. It is equally trite that the cost of eliminating all risk may well result in no profit left to be made. The fiduciary duties of directors are not so naively constructed that they are not only duty bound to take no risk, eliminate all risks but also must only ensure profits. Nor it is intended that the courts should become forums of appeal on business decisions (see paras 12–13).

(4) Although the High Court did refer to the correct law as to the fiduciary duties of directors to act honestly, to use reasonable diligence, and in bona fide manner in the best interests of the company, the High Court allowed itself to be led astray by making the assessment upon hindsight. There was no evidence that at the time they made the payment, it was a risk they should never have taken. Successfully obtaining the joint venture and commencing works on the JKR project, and the fact that there is no evidence that Tangkas Hadapan sought payment for contribution under the JVA whilst denying the earlier payment, provides no basis to hold the appellants did not act honestly or were not acting in the best interests of the company (see para 14).

(5) There is no evidence that the directors acted dishonestly to siphon out the respondent company's money, or did not use reasonable diligence in carrying out their duties as directors. All that was before the court is that they paid out RM2m to Tangkas Hadapan to secure the contract. That

the contract was awarded to the main contractors and a subcontract was entered into with Tangkas Hadapan, and for the performance of which the respondent company obtained a joint venture with Tangkas Hadapan eliminated any folly that may be attributed to making the payment without first ensuring the money went to the proper parties and a joint venture entered into. There was neither reason nor evidence advanced that had the Tangkas Hadapan SCA with its main contractors proceeded as according to their agreement, that the JVA between the respondent company and Tangkas Hadapan could still not have proceeded on terms as agreed (see para 14).

[Bahasa Malaysia summary

Perayu telah merayu terhadap keputusan Mahkamah Tinggi menyebelahi responden berkaitan dakwaan pelanggaran kewajipan fidusiari perayu-perayu sebagai pengarah-pengarah responden syarikat berhubung tiga projek yang dilaksanakan oleh responden. Mahkamah Tinggi telah memerintahkan perayu membayar responden sejumlah RM2 juta bersama faedah 4% setahun dari tarikh writ hingga tarikh bayaran dengan kos dikenakan cukai. Perayu-perayu merupakan pengarah-pengarah responden yang terlibat dalam usaha sama dalam ketiga-tiga projek tersebut. Tuntutan oleh responden syarikat berasaskan dakwaan pelanggaran kewajipan fidusiari perayu-perayu dengan Tangkas Hadapan dan Amirol Bakti. Mahkamah Tinggi mendapati bahawa berkenaan: projek usaha sama dengan Amirol Bakti, responden telah gagal membuktikan, atas imbangan kebarangkalian, dakwaan kerugian dan bahawa ia telah disebabkan oleh tindakan, peninggalan atau pelanggaran kewajipan fidusiari perayu-perayu, dan projek usaha sama dengan Tangkas Hadapan, responden telah, atas imbangan kebarangkalian membuktikan pelanggaran kewajipan fidusiari oleh perayu-perayu dengan meluluskan dan secara tidak bertanggungjawab melepaskan bayaran RM2 juta tanpa kuasa lembaga pengarah dan sebelum memasuki perjanjian yang mengikat dan boleh dikuat kuasakan dengan Tangkas Hadapan. Tiada rayuan oleh responden terhadap penolakan tuntutannya berhubung usaha sama dengan Amirol Bakti. Perayu-perayu telah merayu terhadap perintah untuk membayar sejumlah RM2 juta bersama faedah pada kadar 4% dari tarikh pemfailan writ sehingga penyelesaian penuh, dengan kos berhubung usahasama responden syarikat dengan Tangkas Hadapan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Fakta tentang membuat bayaran RM2 juta tanpa resolusi pengarah yang memberi kuasa yang sama menjadi tidak penting apabila resolusi pemegang saham memberi kuasa pelaksanaan perjanjian usaha sama itu. Tiada keterangan bahawa Tangkas Hadapan menafikan telah menerima wang. Fakta bahawa perjanjian usaha sama itu wujud dan responden syarikat telah memulakan kerja dan prestasi kerja telah dikemukakan,

menjadikannya jelas dengan sendirinya bahawa bayaran itu memainkan peranan yang membawa kepada perjanjian usaha sama itu dan responden syarikat memperoleh kerja itu (lihat perenggan 11).

(2) Masalah tidak menjadi pertikaian sama ada RM2 juta itu telah dibayar menurut perjanjian usaha sama itu, tetapi timbul apabila bayaran ansuran daripada JKR, diletakkan ke dalam akaun projek itu dialihkan oleh kontraktor utama bertentangan dengan perjanjian subkontrak mereka dengan Tangkas Hadapan. Dari kegagalan Tangkas Hadapan yang telah berhenti untuk meneruskan dengan kontraktor utama, perjanjian usaha sama antara responden syarikat dan Tangkas Hadapan menjadi sia-sia. Tiada bukti dan ia bukan kes responden syarikat jikapun bayaran berperingkat JKR tidak dialihkan oleh kontraktor utama itu, usahas ama dengan Tangkas Hadapan masih akan gagal. Dalam keadaan berikut, Mahkamah Tinggi dengan jelas telah salah dalam memahami keterangan yang di hadapannya dan telah membuat penemuan yang sebaliknya tidak mungkin dibuat (lihat perenggan 11).

(3) Pengarah-pengarah boleh mengambil risiko dengan harta syarikat di mana mereka secara jujur mempercayai bahawa untuk berbuat demikian adalah demi kepentingan syarikat. Ini sememangnya asas keusahawanan. Hanya kerana seorang pengarah telah membuat keputusan salah tidak bermaksud dia telah melanggar kewajipan fidusiarinya kepada syarikat. Berniaga bukan untuk yang tidak berpengalaman. Adalah nyata bahawa menjalankan perniagaan sentiasa melibatkan elemen risiko. Adalah nyata juga bahawa untuk bebas daripada apa-apa risiko mungkin mengakibatkan tiada keuntungan dibuat. Kewajipan fidusiari pengarah-pengarah tidak dibuat tanpa pengalaman sehingga mereka tidak terikat dengan kewajipan untuk tidak mengambil apa-apa risiko, bebas daripada semua risiko tetapi juga hanya memastikan keuntungan. Ia juga tidak bertujuan yang mahkamah patut menjadi forum rayuan untuk keputusan perniagaan (lihat perenggan 12–13).

(4) Walaupun Mahkamah Tinggi telah merujuk kepada undang-undang yang betul berhubung kewajipan fidusiari pengarah untuk bertindak secara jujur, untuk menggunakan usaha yang munasabah, dan secara bona fide demi kepentingan syarikat, Mahkamah Tinggi telah membenarkan dirinya tersasar daripada membuat penilaian atas pengalaman lalu. Tiada keterangan bahawa pada masa mereka membuat bayaran, ia merupakan risiko yang mereka tidak patut ambil. Setelah berjaya memperoleh usaha sama itu dan memulakan kerja untuk projek JKR itu, dan fakta bahawa tiada keterangan yang Tangkas Hadapan memohon bayaran untuk sumbangan di bawah perjanjian usaha sama sementara menafikan bayaran terdahulu, tidak memberikan asas untuk memutuskan perayu-perayu tidak bertindak secara jujur atau tidak bertindak demi kepentingan syarikat (lihat perenggan 14).

(5) Tiada keterangan bahawa pengarah-pengarah bertindak secara tidak jujur untuk melesapkan wang responden syarikat, atau tidak menggunakan usaha yang munasabah dalam menjalankan kewajipan mereka sebagai pengarah-pengarah. Apa yang di hadapan mahkamah adalah bahawa mereka telah membayar RM2 juta kepada Tangkas Hadapan untuk menjamin kontrak. Di mana kontrak itu telah diawardkan kepada kontraktor utama dan subkontrak itu telah dimasuki dengan Tangkas Hadapan, dan untuk prestasi di mana responden syarikat telah memperoleh usahasama dengan Tangkas Hadapan melenyapkan apa-apa kesilapan yang mungkin menjadi punca untuk membuat bayaran tanpa terlebih dahulu memastikan wang itu diberi kepada pihak yang sewajarnya dan satu usaha sama telah dimasuki. Tiada sebab atau keterangan yang dikemukakan di mana jika Tangkas Hadapan dengan kontraktor utamanya meneruskan sepertimana perjanjian mereka, perjanjian usaha sama antara responden syarikat dan Tangkas Hadapan masih tidak mungkin meneruskan atas terma yang dipersetujui (lihat perenggan 14).]

Legislation referred to

Companies Act 1965 s 147(3)

Appeal from: Civil Suit No MT2–22–610 of 2008 (High Court, Johor Bahru)

Ng Chew Hor (Ng, Fan & Assoc) for the appellants.
T Gunaseelan (Nora Hayati Ismayatim with him) (Gunaseelan & Assoc) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The defendants Tan Joo Chai and Heng Peng Siang ('the appellants') appealed against the decision of the High Court in favour of the plaintiff Eco Water Technologies (M) Sdn Bhd ('the respondent company') in respect of alleged breaches of the appellants' fiduciary duties as directors of the respondent company in relation to three projects undertaken by the respondent.

[2] At the conclusion of the trial, the High Court allowed the respondent company's claim and ordered the appellants to pay the respondent company the sum of RM2m with interest at 4%pa from the date of the writ until the date of payment with costs to be taxed.

BACKGROUND

[3] The appellants were directors of the respondent company which was involved in joint ventures in three projects:

(a) Projek Membina dan Menyiapkan Jalan Kesban Dan Jabatan Fasa (Segmen A) dari Pengkalan Kubor ke Kuala Jambu, Kelantan Darul Nairn ('the Kelantan Project') with Tangkas Hadapan Sdn Bhd ('Tangkas Hadapan');

(b) Projek Pembinaan Jeti Marina di Tanjung Gemok; and

(c) Projek Kumpulan Pendidikan YPJ, Mersing with Amirol Bakti Sdn Bhd ('Amirol Bakti').

[4] The claim by the respondent company was founded upon the appellants' alleged breach of fiduciary duty as directors of the respondent company in respect of the joint venture projects with Tangkas Hadapan and Amirol Bakti.

[5] The High Court found that in respect of:

(a) the joint venture project with Amirol Bakti, the respondent had failed to prove, upon a balance of probabilities, the alleged losses and that they were caused by the acts, omissions or breach of fiduciary duties of the appellants as directors of the respondent; and

(b) the joint venture project with Tangkas Hadapan, the respondent had, upon a balance of probabilities proved breach of fiduciary duties by the appellants by approving and irresponsibly releasing the payment of RM2m without authority of the board of directors and before entering into a binding and enforceable agreement with Tangkas Hadapan.

[6] There is no appeal by the respondent against the dismissal of its claim in respect of the joint venture with Amirol Bakti.

[7] The appellants appealed against the order to pay damages in the sum of RM2m with interest at 4% from the date of the filing of the writ until full settlement, with costs in respect of the respondent company's joint venture with Tangkas Hadapan.

[8] The Kelantan Project was awarded through an acceptance of tender on 19 July 2004 by the Jabatan Kerja Raya ('JKR') to Eight Ace Sdn Bhd and Arrem Corp Sdn Bhd ('the main contractors'). The main contract between them was executed on 25 August 2004 with construction work to commence on 12 September 2004. The main contractors subcontracted the work to Tangkas Hadapan under a subcontract agreement ('the SCA'). Tangkas Hadapan subsequently entered into a joint venture with the respondent company.

REASONING AND CONCLUSION

[9] At para [6] of its grounds of judgment, the High Court stated clearly that the only claim for breach of fiduciary duties of directors allowed by it was in respect of the payment of RM2m to Tangkas Hadapan and that all the remaining items of claim were dismissed for insufficiency of evidence.

[10] The High Court found the appellants, as directors of the respondent company, caused the respondent company to pay the RM2m to Tangkas Hadapan on the grounds:

(a) facts:

(i) under the SCA between Tangkas Hadapan and the main contractors, a project account was opened into which progress payments received from the JKR was to be paid and Tangkas Hadapan together with the main contractors would be joint signatories of the account;

(ii) under the joint venture agreement between Tangkas Hadapan and the respondent ('the JVA'), it was agreed each party would contribute RM2m;

(iii) it was also agreed that the contribution by the respondent was to be repaid in priority to any other distribution of profits under the JVA;

(iv) the respondent commenced works and progress claims were submitted through Tangkas Hadapan and the main contractors to the JKR;

(v) however, when JKR made payment into the project account, the main contractors, in breach of cl 11 of the SCA, channelled the payments to another account opened by the main contractors;

(vi) in light of the breach, Tangkas Hadapan ceased work under the SCA; and

(vii) to date, the RM2m paid by the respondent to Tangkas Hadapan has not been refunded or recovered;

(b) the particulars pleaded:

(i) appellants made a payment of RM2m to Tangkas Hadapan Sdn Bhd without ascertaining whether Tangkas Hadapan Sdn Bhd expended the money for the said project;

(ii) made the payment of RM2m to Tangkas Hadapan Sdn Bhd even before a joint venture agreement is executed;

(iii) incurring expenses in respect of the said project through a company

called Khas Corporation Sdn Bhd, which has ties with Tangkas Hadapan Sdn Bhd before the said joint venture;

(iv) failing to take appropriate steps to ascertain whether the money received by the joint venture was deposited in an account wherein the interest of the plaintiff would be protected;

(c) findings:

(i) there were a directors' resolution and a shareholders' resolution both dated 26 October 2004 which authorised the entering into of the JVA and a shareholders' resolution also dated 26 October 2004 authorising entry into the JVA and appointing the first appellant as authorised representative of the respondent pursuant to s 147(3) of the Companies Act 1965 to sign the JVA;

(ii) but in respect of the RM2m payment:

(1) it was made more than seven months before the execution of the JVA and was without authority;

(2) both appellants admitted making the payment without director's resolution to authorise the payment but believed the payment was in the best interests of the respondent company to secure the project and in any case it was a refundable sum;

(3) the payments under the JVA were to be made in equal amounts, and the appellants had not ascertained whether Tangkas Hadapan had also contributed to the project and how it had expended the money to secure the principal contract;

(4) there were no documentation made at the time of the payment showing the purpose of the payment and the agreed terms and conditions. There was therefore nothing (on) record to bind Tangkas Hadapan even though it had received a huge sum of money from the respondent;

(5) nowhere in the JVA or in any document is it stated that the payment was to be converted from a commitment fee originally to a capital contribution;

(6) there was simply no evidence in support of the assertion that the initial payment meant to secure the Kelantan project, which was successful with the entering into of the JVA, was then treated and regarded as the respondent's contribution to the Kelantan project that was to be refunded before distribution of profits;

(7) the burden of proving these assertions in their own defence was on the appellants;

(8) PW2, a forensic investigative accountant with Alliance IFA (M) Sdn Bhd specialising in forensic investigation, was appointed by the respondent company to investigate irregularities, testified he found the appellants released the sum of RM2m on 11 March 2004 without any sort of legal documentation or written assurance from Tangkas Hadapan pertaining to the receipt of the said payment, and without any evidence from Tangkas Hadapan that they had contributed a similar amount, nor is there any mention in the SCA that the subcontractors had already invested RM4m as initial capital to secure the contract;

(9) though PW2 had wrongly refused to tender the forensic report, PW2 had given full and direct oral evidence of his observations and findings;

(10) the haste in releasing the money to Tangkas Hadapan without taking any steps to safeguard the interests of the respondent disclosed, in my view, not only negligence but a lack of bona-fide on the part of the appellant; and

(11) both defendants were unable to provide any or reasonable explanation why this huge amount was paid at that point in time without board approval and for a doubtful purpose;

(d) the law on director's fiduciary duties:

(i) *Halsbury's Laws of Malaysia*, Vol 13 (pp 230–223) — the duty to act honestly, and to use reasonable diligence in the discharge of his duties;

(ii) an act done deliberately disregarding knowledge that it is not in the company's interest is not bona fide;

(iii) the duty to act honestly includes the duty to act in the interest of the company; and

(iv) the book *'The Companies Act of Malaysia An Annotation'* by Walter Woon & Andrew Hicks on the test as to acting in the company's interest; and

(e) decision and reasoning.

[11] With respect, the fact of making payment of RM2m on 11 March 2004 without a director's resolution authorising the same became immaterial when the shareholder's resolution made on 26 October 2004 authorised the execution of the JVA, which was signed on the same date. There is no evidence that Tangkas Hadapan denied receiving the money. Indeed the fact the JVA

came into being and the respondent company commenced work and progress claims were submitted, makes it self-evident that the payment played a role to lead to the JVA and the respondent company obtaining work. The problem was not a dispute as to whether RM2m was paid according to the JVA, but arose when the progress payments from the JKR, put into the project account was diverted by the main contractors contrary to their subcontract agreement with Tangkas Hadapan. In the fall out from Tangkas Hadapan ceasing to proceed with the main contractors, the JVA between the respondent company and Tangkas Hadapan came to nought. There is no evidence and it is not the respondent company's case that even if the JKR progress payments were not diverted by the main contractors, the joint venture with Tangkas Hadapan would have failed. In the circumstances, the High Court clearly misappreciated the evidence before it and came to a finding it could otherwise not have made.

[12] We endorse the statement extracted from the book *'The Companies Act of Malaysia An Annotation'* by Walter Woon & Andrew Hicks and reproduced in the judgment of the High Court that:

> ... It is not for the court to gauge what the interest of the company are. It has been said that 'directors must exercise their discretion bona fide in what they consider — not what a court may consider — is the interests of the company'; *Re Smith & Fawcett Ltd* [1942] Ch 304, 306 per Lord Greene MR (Court of Appeal, England); accepted by the Court of Appeal in *Cheong Kim Hock v Lin Securities (Re)* [1992] 2 SLR 349 (Court of Appeal, Singapore). The courts do not sit as courts of appeal over decisions of management. As Lord Wilberforce put it in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 832 (House of Lords):
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> > Their lordships accept that such a matter as the raising of finance is one of management, within the responsibility of directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.
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> This is judicial recognition of the fact that different people can have different opinions about what is good for a company and in its interests. Directors may take risks with the company's property where they honestly believe that to do so is in the company's interest: *Cheam Tat Pang v PP* [1996] 1 SLR 541, 561 (High Court, Singapore). This is indeed the essence of entrepreneurship. Just because a director makes a wrong decision does not mean that he breached his fiduciary duty to the company. The above dicta imply that the test is subjective and that the courts will not interfere in a management decision.

[13] Doing business is not for the naive. It is trite that doing business always involves an element of risk. It is equally trite that the cost of eliminating all risk may well result in no profit left to be made. The fiduciary duties of directors are

not so naively constructed that they are not only duty bound to take no risk, eliminate all risks but also must only ensure profits. Nor it is intended that the courts should become forums of appeal on business decisions.

[14] Although the High Court did refer to the correct law as to the fiduciary duties of directors to act honestly, to use reasonable diligence, and in bona fide manner in the best interests of the company, the High Court allowed itself to be led astray by making the assessment upon hindsight. There is no evidence that at the time they made the payment, it was a risk they should never have taken. Successfully obtaining the joint venture and commencing works on the JKR project, and the fact that there is no evidence that Tangkas Hadapan sought payment for contribution under the JVA whilst denying the earlier payment, provides no basis to hold the appellants did not act honestly or were not acting in the best interests of the company. There is no evidence that they acted dishonestly to siphon out the respondent company's money, or did not use reasonable diligence in carrying out their duties as directors. All that is before the court is that they paid out RM2m to Tangkas Hadapan to secure the contract. That the contract was awarded to the main contractors and a sub-contract was entered into with Tangkas Hadapan, and for the performance of which the respondent company obtained a joint venture with Tangkas Hadapan eliminates any folly that may be attributed to making the payment without first ensuring the money went to the proper parties and a joint venture entered into. There was neither reason nor evidence advanced that had the Tangkas Hadapan SCA with its main contractors proceeded as according to their agreement, that the JVA between the respondent company and Tangkas Hadapan could still not have proceeded on terms as agreed.

[15] Accordingly, we allowed the appeal, set aside the order of the High Court, fixed costs in the sum of RM40,000 here and below, and refunded the deposit to the appellants.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor